IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JUDY D. LONG,

Plaintiff,

v. **Case No. 03-2570-JWL**

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Judy D. Long brings this action pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3) seeking judicial review of the final decision of defendant Jo Anne B. Barnhart, the Commissioner of Social Security (the Commissioner), denying Ms. Long's applications for disability insurance benefits (DIB) under Title II of the Social Security Act, 42 U.S.C. § 423, and supplemental security income (SSI) under Title XVI of the Social Security Act, 42 U.S.C. § 1381a. Plaintiff contends the Commissioner erred by failing to assign adequate weight to the opinions of her treating and examining physicians, by finding her allegations less than fully credible, and by failing to establish that she could perform alternative work other than her past relevant work. For the reasons explained below, the court agrees in part and reverses and remands this case to the Commissioner for further proceedings consistent with this memorandum and order.

I. BACKGROUND

Plaintiff has a bachelors degree and a relatively steady work history covering approximately fifteen years as a city clerk and before that as an assistant city clerk. On October 9, 1999, she was severely injured in a motor vehicle accident when her vehicle collided with a semi-truck. She was immediately hospitalized and later that day underwent her first surgery for extensive injuries including abrasions, contusions, and numerous bone fractures. She remained in the hospital for approximately two months and underwent numerous additional surgeries and extensive physical therapy.

Approximately nine months after the accident, in August of 2000, she attempted to return to her work as a city clerk in a part-time capacity. Almost immediately, she began experiencing headaches, short-term memory difficulties, difficulty concentrating, an inability to stay focused, and abnormal movement in her left eye. A neurologist diagnosed her with a probable head injury with a cerebral concussion and post head injury syndrome with impaired concentration, memory, and attention to detail. The neurologist also noted diplopia (double vision). Plaintiff also continued to experience pain in her extremities especially where her bones had been screwed together. In November of 2000, she underwent yet another surgery for her physical ailments. In a narrative report dated January 12, 2001, plaintiff's primary treating physician, Gregory M. Thomas, M.D., concluded:

> In summary, this patient had a closed head injury which turns out to have been the most devastating part of her severe car accident despite the many fractures that took a long time to heal. She is not able to function at the city clerk level and, in fact, finds just simple clerical work beyond her abilities at this time due to fatigue and inability to stay on task with short term memory.

(Tr. at 277.) Around that same time period, plaintiff separated from her employment with the city because she was unable to perform her job.

Plaintiff initially filed an application for DIB and SSI on April 6, 2000, claiming that she became disabled beginning October 9, 1999. This application was denied on May 26, 2000, and she did not pursue this initial application further. Later, she filed second applications for both DIB and SSI, claiming that she became disabled beginning February 2, 2001. These applications were denied initially and upon reconsideration. At plaintiff's request, an administrative law judge (the ALJ) held a hearing. The hearing was held on May 21, 2002, and both plaintiff and her attorney were present. On June 27, 2002, the ALJ rendered a decision denying plaintiff's claim for benefits. The ALJ found that plaintiff had not engaged in substantial gainful activity since the alleged onset of her disability, that she suffered from a severe impairment or combination of impairments, that her medically determinable impairments did not meet or equal any of the criteria in the listing of impairments, that she was unable to perform any of her past relevant work, but that she has the residual functional capacity (RFC) to perform other work that exists in significant numbers in the national economy. Thus, the ALJ determined that plaintiff was not disabled and denied benefits. The Appeals Council denied plaintiff's request for review, and therefore the ALJ's decision stands as the Commissioner's final decision.

II. STANDARD OF REVIEW

On appeal, this court's review of the Commissioner's determination that a claimant is not disabled is limited. *Hamilton v. Sec'y of HHS*, 961 F.2d 1495, 1497 (10th Cir. 1992). The court examines whether the decision is supported by substantial evidence in the record as a whole and whether the correct legal standards were applied. *Langley v. Barnhart*, 373 F.3d 1116, 1118 (10th Cir. 2004); *Hamlin v. Barnhart*, 365 F.3d 1208, 1214 (10th Cir. 2004). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Doyal v. Barnhart*, 331 F.3d 758, 760 (10th Cir. 2003). "A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it." *Langley*, 373 F.3d at 1118 (quotation omitted); *Hamlin*, 365 F.3d at 1214 (same). The court neither reweighs the evidence nor substitutes its judgment for that of the Commissioner. *Langley*, 373 F.3d at 1118; *Hamlin*, 365 F.3d at 1214. Grounds for reversal exist if the agency fails to apply the correct legal standards or fails to demonstrate reliance on the correct legal standards. *Hamlin*, 365 F.3d at 1114.

III. ANALYSIS

"The Commissioner follows a five-step sequential evaluation process to determine whether a claimant is disabled." *Doyal*, 331 F.3d at 760; *see also* 20 C.F.R. § 416.920 (explaining this five-step process). In this case, the ALJ determined that plaintiff was not disabled at step five because he found that although plaintiff could not perform her past relevant work she could perform other work that exists in the national economy. At step five,

the Commissioner bears the burden of showing that the claimant retains the RFC to perform other work available in the national economy, considering such additional factors as age, education, and past work experience. *Bowen v. Yuckert*, 482 U.S. 137, 146, 148 & n.5 (1987); *Rutledge v. Apfel*, 230 F.3d 1172, 1174 (10th Cir. 2000); *Haddock v. Apfel*, 196 F.3d 1084, 1088 (10th Cir. 1999).

In this case, the ALJ determined that plaintiff has the following RFC:

> the claimant has the physical capabilities to perform unskilled, sedentary work. She is capable of lifting and carrying 10 pounds occasionally; she can sit 5 hours during an 8 hour day and 45 minutes continuously; she can stand 3 hours during an 8 hour day and 15 to 20 minutes continuously; she must be able to alternate between sitting and standing after 15 to 20 minutes of standing and 45 minutes of sitting; she cannot kneel, squat, balance, or crawl; she cannot reach or work above shoulder level; she cannot climb ladders, ropes, or scaffolds and can occasionally climb ramps and stairs; she can occasionally grasp and perform fine manipulation with her right dominant hand; and she cannot operate a keyboard or typewriter at a sustained, accurate speed. She is moderately limited in her ability to remember locations and work-like procedures, understand and remember detailed instructions, carry out detailed instructions, maintain attention and concentration for extended periods, and complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods.

(Tr. at 27.) Based on this RFC, the ALJ determined that plaintiff could not perform her past relevant work as a city clerk or assistant city clerk. The ALJ nonetheless found that plaintiff is capable of making a successful adjustment to work that exists in significant numbers in the national economy. The ALJ explained that the vocational expert (the VE) testified that a person of plaintiff's age, education, past relevant work experience, and RFC could perform approximately ten to fifteen percent of the sedentary, unskilled base of jobs. The VE

specifically identified the jobs of surveillance system monitor, cashier, and call-out operator/information clerk.

Plaintiff now argues that the ALJ erred by failing to assign adequate weight to the opinions of her treating and examining physicians, by finding her allegations of disability less than fully credible, and by failing to establish that she could perform alternative work other than her past relevant work.

A. Weight Given to Medical Opinions

Plaintiff argues that the ALJ erred in numerous respects by failing to assign adequate weight to the medical opinions of record. Specifically, she argues that the ALJ failed to assign adequate weight to the opinion of her treating physician, Gary Harbin, M.D., that she is limited to working four to six hours a day because of her musculoskeletal injuries. She also argues that the ALJ should have assigned greater weight to the opinion of her primary care physician, Dr. Thomas, that she is incapable of performing physical labor and would require extensive retraining and time to determine whether she could ever be gainfully employed as a consequence of short-term memory deficits. With respect to plaintiff's nonexertional impairments, plaintiff contends that the ALJ assigned too much weight to the conclusion of ElDean Kohrs, Ph.D., misconstrued the opinion of Lisa Lewis, Ph.D., and did not assign enough weight to the opinion of Kathy Pearce, Ph.D., which was in relevant part consistent with Dr. Lewis's opinion. For the reasons explained below, the court agrees with plaintiff's arguments on these issues.

1. *Dr. Harbin*

In deciding how much weight to give a treating source opinion, the ALJ must first determine whether the opinion is entitled to controlling weight. *Langley*, 373 F.3d at 1119; *Watkins v. Barnhart*, 350 F.3d 1297, 1300 (10th Cir. 2003). "The ALJ is required to give controlling weight to the opinion of a treating physician as long as the opinion is supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in the record." *Hamlin*, 365 F.3d at 1215. Even if the opinion is not entitled to controlling weight, it is still entitled to deference and must be weighed using the following six factors:

> (1) the length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship, including the treatment provided and the kind of examination or testing performed; (3) the degree to which the physician's opinion is supported by relevant evidence; (4) consistency between the opinion and the record as a whole; (5) whether or not the physician is a specialist in the area upon which an opinion is rendered; and (6) other factors brought to the ALJ's attention which tend to support or contradict the opinion.

Langley, 373 F.3d at 1119 (quotation omitted); *accord Watkins*, 350 F.3d at 1301 (same); *see also* 20 C.F.R. §§ 404.1527(d), 416.927(d) (listing these factors); Soc. Sec. Rul. 96-2p, 1996 WL 374188, at *4 (July 2, 1996) [hereinafter SSR 96-2p] (treating source opinions that are not entitled to controlling weight are still entitled to deference and must be weighed using all of the factors provided in 20 C.F.R. §§ 404.1527 and 416.927). After considering these factors, the ALJ must give good reasons for the weight he ultimately assigns to the opinion. *Watkins*, 350 F.3d at 1300; *Doyal*, 331 F.3d at 762; SSR 96-2p, at *5. In the end, the ALJ must give specific, legitimate reasons for disregarding a treating physician's opinion that a

claimant is disabled. *Goatcher v. United States Dep't of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995).

The ALJ gave "little weight" to Dr. Harbin's opinion that plaintiff is limited to working four to six hours as a consequence of her musculoskeletal injuries because Dr. Harbin "provided no basis for this conclusion" and this statement was "inconsistent with his instructions given on January 22, 2001 for the claimant to perform progressive jogging, weight lifting, and jump rope drills." (Tr. at 26.) Although the ALJ gave specific reasons for rejecting Dr. Harbin's opinion, those reasons were not particularly well founded.

The ALJ correctly observed that on January 22, 2001, Dr. Harbin outlined a physical therapy plan for plaintiff which directed her to perform progressive jogging, weight lifting, and jump rope drills. Dr. Harbin's treatment notes from that day, however, noted that plaintiff was barely able to do one leg hop on the left and unable to do a leg hop at all on the right. Clearly, plaintiff would have had difficulty jogging and jumping rope given these limitations. It appears that the ALJ misinterpreted Dr. Harbin's therapy plan as indicative of plaintiff's ability to perform those activities. Further, the ALJ did not discuss the significance of Dr. Harbin's treatment note from April 23, 2001, which identified decreased ranges of motion in some of her joints, noted that X-rays showed "severe degenerative changes" in her right foot, and stated that plaintiff was "not progressing as fast in her rehab as what was seen in the past." (Tr. at 380.) He recommended a five-year, as opposed to a previously anticipated two- to three-year health club membership. He also predicted that plaintiff would require numerous surgeries in the future. This treatment note somewhat foreshadowed his directive only two months later

on June 20, 2001, that plaintiff's "work day is definitely limited to probably 4-6 hours a day." (Tr. at 379.) Thus, the ALJ's explanation that Dr. Harbin's statement is inconsistent with his instructions on January 22, 2001, is incorrect. Further, the ALJ did not state that he was declining to give Dr. Harbin's opinion controlling weight because it was unsupported by medically acceptable clinical and laboratory diagnostic techniques. Thus, it appears that Dr. Harbin's statement is likely entitled to controlling weight.

Even if the ALJ had a valid basis upon which he could have declined to give this opinion controlling weight, however, the ALJ was at a bare minimum required to evaluate the degree of deference to which Dr. Harbin's opinion is entitled in light of the six factors outlined above. *See, e.g.*, *Langley*, 373 F.3d at 1120-21 (holding the ALJ erred by failing to evaluate what lesser weight a treating physician's opinion should be given). An examination of these factors would have required the ALJ to acknowledge, for example, the significance of Dr. Harbin's treatment relationship with plaintiff. He began working with plaintiff on her physical rehabilitation efforts on November 1, 1999, while she was in the hospital after the accident. By the time he gave his opinion that she could only work four to six hours a day on June 20, 2001, he had been working with plaintiff on her physical rehabilitation for more than one and a one-half years. During that time, he regularly performed physical examinations of her and examined x-rays of her healing joints. Further, his opinion is supported by the record as a whole, including plaintiff's testimony, the testimony of people with whom she used to work demonstrating that she tried but was unable to return to working full eight-hour workdays, and the opinions of Dr. Thomas and Dr. Lewis, discussed *infra*. The ALJ also did not discuss the

fact that Dr. Harbin appears to specialize in injury rehabilitation and therefore presumably would be in a position to evaluate the conditions under which one of his patients would be able to return to work.

In sum, the ALJ's determination that Dr. Harbin's opinion is entitled to "little weight" is unsupported by substantial evidence in the record and the ALJ failed to apply the correct legal standards in considering the weight to be given to Dr. Harbin's opinion. Accordingly, the court remands this case to the ALJ to reassess the weight to be given to Dr. Harbin's opinion, but this time applying the correct legal standards and evaluating all of the relevant evidence in the record. *See, e.g.*, *Watkins*, 350 F.3d at 1301 (remanding for the Commissioner to apply the correct legal standards in determining the weight to be assigned to a treating physician's opinion).

2. *Dr. Thomas*

The ALJ also gave "little weight" to the opinions of plaintiff's primary care physician, Dr. Thomas, that plaintiff was incapable of performing physical labor and would require extensive retraining and time to determine whether she could ever be gainfully employed as a consequence of short-term memory deficits. The ALJ discounted these opinions on the basis that "[t]here is no evidence of short-term memory deficits"; her scores on the Wechsler Memory Scale were in the high average and superior range on May 22, 2000, and in the average range on November 2, 2000; Dr. Thomas is a general practitioner and not a neurologist; Dr. Thomas appears to have based his opinions on plaintiff's subjective complaints rather than objective medical evidence; his statements are inconsistent with the record as a whole; he

provided no basis for his statement that plaintiff was incapable of performing physical labor; and his treatment notes contain no evidence of severe physical impairments which would support this statement.

Some of the reasons that the ALJ gave for discounting Dr. Thomas's opinions are flatly incorrect. For example, the ALJ's statement that there is no evidence of short-tem memory deficits ignores contrary testimony from plaintiff and her co-workers as well as the results of psychological test results as described by Dr. Lewis, to whom Dr. Thomas referred plaintiff for psychological evaluation, and Dr. Pearce, which are discussed *infra*. Further, Dr. Thomas's opinions are not inconsistent with the record as a whole, which appears on balance to provide some support for Dr. Thomas's opinion. Further, as with Dr. Harbin's opinion, the ALJ failed to apply the correct legal standards in evaluating Dr. Thomas's opinion by failing to discuss, first, whether Dr. Thomas's opinions are entitled to controlling weight and, second, if not, the degree of deference to which his opinions are entitled in light of the six factors outlined above.

In sum, as with Dr. Harbin's opinion, the ALJ's determination that Dr. Thomas's opinion is entitled to "little weight" is unsupported by substantial evidence in the record and the ALJ failed to apply the correct legal standards in considering the weight to be given to his opinion. Accordingly, the court also remands this determination to the ALJ to reassess the weight to be given to Dr. Thomas's opinion, but this time applying the correct legal standards and evaluating all of the relevant evidence in the record.

3. *Medical Opinions Concerning Plaintiff's Mental Limitations*

In addition, the ALJ gave "little weight" to the opinions of Dr. Pearce that plaintiff was markedly limited in her abilities to maintain attention and concentration for extended periods of time and to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods. The ALJ discounted this opinion on the basis that Dr. Pearce did not provide test results but merely stated that plaintiff's test scores were lower than what one would expect given her high I.Q.; Dr. Pearce provided no basis for giving plaintiff marked limitations; and Dr. Pearce's opinions are inconsistent with the record as a whole, such as Dr. Kohrs' opinions that plaintiff could learn and follow simple instructions, concentrate and persist, relate to others in a meaningful manner, and perform normal work activities in a normal work schedule, which the ALJ stated was consistent with Dr. Lewis's statement that neuropsychological test results indicated only mild neurocognitive impairment of higher cognitive abilities. The ALJ gave the opinions of Dr. Kohrs and Dr. Lewis "significant weight as they are consistent with the record and based on objective test results." (Tr. at 26.) Given the ALJ's reliance on the fact that the opinions of Dr. Kohrs and Dr. Lewis are consistent and contrary to the opinion of Dr. Pearce, each of those opinions is relevant in evaluating the ALJ's logic.

On May 22, 2000, Dr. Kohrs performed a psychological examination of plaintiff. The Weschler Adult Intelligence Scale-III (WAIS-III) was administered and plaintiff demonstrated intellectual functioning in the superior range. The Weschler Memory Scale was also administered. Plaintiff demonstrated a general memory in the high average range, a working

memory in the superior range, no significance between immediate and delayed visual or auditory memory, auditory memory superior to her visual memory, and better delayed visual memory than her immediate visual memory. Dr. Kohrs opined that plaintiff's ability to perform activities of daily living, to learn and follow simple instructions, to concentrate and persist in pace, to relate to others, and to perform normal work activities in a normal work schedule was not impaired by psychopathology.

Dr. Thomas referred plaintiff to Dr. Lewis for psychological testing. On November 2, 2000, Dr. Lewis performed a neuropsychological evaluation of plaintiff. Dr. Lewis administered the WAIS-III, Weschler Memory Scale-III, Shipley Hartford Test, modified Wisconsin Card Sort Test, Boston Naming Test, Phonologic Fluency Test, Aphasia Screening Battery, Trail Making A & B, Hooper Test of Visual Organization, and fingertapping test. Dr. Lewis opined that plaintiff's neuropsychological test performance indicated mild neurocognitive impairment of specific brain-behavior higher cognitive abilities. Specifically, plaintiff evidenced mild impairment of her working memory (i.e., difficulty taking in and holding information in mind during problem-solving efforts), a weakness in recent auditory memory (i.e., remembering conversations or instructions), a mild deficit in concept formation and abstract problem solving skill, and mild bilateral slowing of manual speed and dexterity. Dr. Lewis concluded:

> It has been a little over a year since the patient's accident. In terms of spontaneous recovery of function, the most rapid period of recovery is likely behind her, though ongoing improvement is likely to occur at a more modest rate over at least the coming year. Her treating physicians may wish to consider the following interventions. First, working 3/4 time is likely over-taxing her

> current abilities. She still fatigues more rapidly than normal, in part because doing previously easy activities is now difficult. When fatigued all of her abilities suffer, especially those that have been impaired by her TBI [traumatic brain injury]. It may be advisable for her to drop back to four hours a day and gradually increase by one hour a day as she is able to tolerate it. If she is able to work up to full time, this will likely require incremental increases over a 6-9 month period. . . .

(Tr. at 473-74.) Dr. Lewis recommended cognitive therapy and suggested medication designed to increase plaintiff's ability to sustain focus.

On May 9, 2002, Dr. Pearce performed neurological testing at the request of plaintiff's attorney. The following tests were administered: WAIS-III, Wechsler Memory Scale-III, California Verbal Learning Test-II, Rey-Osterreith Complex Figure Test, Trail Making Test, Stroop Test, Controlled Oral Word Association, Wisconsin Card Scoring Test, and IVA Continuous Performance Test. Dr. Pearce found that although plaintiff's level of intellectual functioning was in the very superior range, her non-verbal, visual spatial, and non-academic-type abilities were significantly greater than her verbal skills. In addition, her significantly low scores on the Wechsler Memory Scale-III indicated that plaintiff had experienced a significant decline in her memory abilities. Other test scores revealed that she is likely to have difficulty performing tasks that are more complex and abstract, that require switching cognitive sets, or that require her to change her attention and focus from one task to another. Although her auditory modality was average, her visual modality was moderately impaired. Dr. Pearce concluded:

> The test results indicate that Judy has experienced a decline in a number of cognitive abilities, including verbal skills, memory abilities, ability to perform tasks that are complex or abstract, ability to switch cognitive sets, ability to

> change her focus from one task to another, and deficits in visual attention processes. Judy is more likely to experience these cognitive difficulties when she is tired, under stress, or in a situation that involves a lot of stimulation or that is highly variable. Since the accident occurred over two years ago, . . . Judy . . . is not likely to regain much of the cognitive functioning that she has lost. . . .

(Tr. at 523-24.) Dr. Pearce further opined that plaintiff is "markedly" limited in her abilities to maintain attention and concentration for extended periods of time and to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods, and also that plaintiff is "moderately" limited in her ability to perform numerous other cognitive functions.

The ALJ reasoned that Dr. Kohrs' opinion is consistent with the opinion of Dr. Lewis because Dr. Lewis stated that plaintiff's neuropsychological test results indicated only a mild neurocognitive impairment of higher cognitive abilities. As plaintiff correctly points out, however, Dr. Kohrs' opinion is otherwise largely inconsistent with Dr. Lewis's opinion. The ALJ "is not entitled to pick and choose from a medical opinion, using only those parts that are favorable to a finding of nondisability." *Robinson v. Barnhart*, 366 F.3d 1078, 1083 (10th Cir. 2004). Although Dr. Lewis admittedly characterized plaintiff's neurocognitive impairment as "mild," she nonetheless concluded that plaintiff's specific cognitive impairments (e.g., working memory, auditory memory, concept formation and abstract problem-solving skills, etc.) were too much for her to be working three-quarters time, and Dr. Lewis specifically recommended that plaintiff reduce her hours because her cognitive

impairments were exacerbated by the fact that she was still easily fatigued. This is entirely consistent with Dr. Pearce's opinion that plaintiff would be markedly limited in her ability to maintain attention and concentration for extended periods and to complete a normal workday without psychologically based symptoms. Like Dr. Lewis, Dr. Pearce based this conclusion on plaintiff's specific cognitive impairments (e.g., memory problems, inability to perform complex or abstract tasks, inability to change focus, etc.). Thus, it is Dr. Kohrs' opinion, not the opinion of Dr. Pearce, that is inconsistent with the other medical evidence pertaining to plaintiff's nonexertional impairments.

Dr. Kohrs' opinion is also inconsistent with the evidence of record from plaintiff's former co-workers. Plaintiff's former supervisor, Rodney Franz, testified at the administrative hearing that when plaintiff returned to work after the accident she failed to complete tasks, forgot assignments, and was unable to perform her tasks reliably. Plaintiff's former co-worker, Barbara Webber, also testified about her observations of plaintiff's mental limitations. She stated that even with regard to "simple things . . . she'd forgotten that that was a part of what she was going to do. . . . [S]ome things didn't get done. . . . That caused some problems and we'd have to redo and back up things that we were trying to get done." (Tr. at 77.) Also, "if she would be working on something and something would distract her from it, then she'd have a hard time. Okay, where was I? What was going on? Or sometimes, just totally forget that she was working on something." (Tr. at 78.) This testimony corroborates the medical opinions of Drs. Lewis and Pearce, not Dr. Kohrs' opinion.

In sum, it is Dr. Kohrs' opinion, not Dr. Pearce's opinion, that is inconsistent with all of the other evidence in the record. The ALJ's heavy reliance on Dr. Kohrs' opinion is unsupported by substantial evidence in the record. On remand, the ALJ shall properly reevaluate all three opinions and the weight that should be given to each.

B. The ALJ's Credibility Determination

An ALJ's credibility determinations are peculiarly within the province of the finder of fact, and the court should not upset the ALJ's credibility determination if it is supported by substantial evidence. *Kepler v. Chater*, 68 F.3d 387, 391 (10th Cir. 1995). Nevertheless, the ALJ's evaluation must contain "specific reasons" to support the credibility finding. *Hardman v. Barnhart*, 362 F.3d 676, 678 (10th Cir. 2004); *accord* Soc. Sec. Rul. 96-7p, 1996 WL 374186, at *2 (July 2, 1996) [hereinafter SSR 96-7p]. The ALJ's credibility findings "should be closely and affirmatively linked to substantial evidence and not just a conclusion in the guise of findings." *Hamlin v. Barnhart*, 365 F.3d 1208, 1220 (10th Cir. 2004) (quotation omitted); *Hardman*, 362 F.3d at 678-79 (same); *see also* SSR 96-7p, at *2 (credibility finding must be "supported by the evidence in the case record, and must be sufficiently specific to make clear . . . the weight the adjudicator gave to the individual's statements and the reasons for that weight"). The ALJ should consider factors such as the claimant's daily activities; the location, duration, frequency, and intensity of the individual's pain or other symptoms; factors that precipitate and aggravate the symptoms; the type, dosage, effectiveness, and side effects of the claimant's medication; persistent attempts to find relief for pain and his or her willingness to try prescribed treatment; and whether the claimant has regular contact with a

doctor. *Hamlin*, 365 F.3d at 1220 (quoting SSR 96-7p, at *3, and *Huston v. Bowen*, 838 F.2d 1125, 1132 (10th Cir. 1988)).

In this case, the ALJ noted that plaintiff testified that she has problems sitting, using a keyboard, and understanding things, and that she was exhausted after four hours of work. She also stated that she could not work due to daily headaches and fatigue, and right arm, knee, hip, and foot pain. She has right thigh pain when she sits and right foot, right knee, left leg, and right hip pain when she walks and stands. She testified that she can sit for thirty minutes at a time and for two to three hours during an eight-hour workday; she can stand fifteen to twenty minutes at a time; she has to elevate her right leg; she cannot grip things; she can type only fifteen or twenty minutes; and she cannot kneel or squat. The ALJ stated that, although he did not doubt that plaintiff had some pain, her allegations were inconsistent with the evidence as a whole and were not credible.

The ALJ first reasoned that plaintiff had made statements to her physical therapist that were inconsistent with allegations of disabling impairments and her failure to follow through with therapy that was recommended by her doctor weighs heavily against her credibility. Like much of the ALJ's opinion, the ALJ's reasoning on this issue is not supported by substantial evidence because the ALJ failed to consider the record as a whole and instead simply relied on considerations that, when viewed in isolation, support his conclusion. For example, although the ALJ noted that on January 25, 2001, plaintiff informed her physical therapist that she was not interested in jogging, weight lifting, and jump rope drills despite her physician's orders, the ALJ ignored other aspects of the physical therapist's January 25, 2001, report

which stated that plaintiff "continues to perform her exercises at home" and that she was not interested in jogging, weight lifting, and jump rope drills because she was more concerned about her right wrist range of motion. Further, although the ALJ noted that on February 20, 2001, plaintiff informed her physical therapist that she had not been very faithful with her exercises at home, the physical therapist's February 20, 2001, treatment note actually stated that plaintiff had not been very faithful with her *cardiovascular* exercises but that she had been performing her right foot and right wrist stretching activities. The ALJ also reasoned that plaintiff was discharged from physical therapy on May 2, 2001, because she had failed to show up for her last two appointments. A look at the physical therapist's prior treatment note on February 20, 2001, however, reveals that it was anticipated that plaintiff would only be seen for one more physical therapy visit in any event. Thus, it appears on balance that plaintiff largely abided by physical therapy directives except perhaps those pertaining to her cardiovascular fitness. Further, as plaintiff correctly points out, before the ALJ may rely on a claimant's failure to pursue prescribed medical treatment as support for the ALJ's determination of noncredibility, the ALJ should consider, among other things, whether the treatment at issue would restore the claimant's ability to work. *Thompson v. Sullivan*, 987 F.2d 1482, 1490 (10th Cir. 1993); *Ragland v. Shalala*, 992 F.2d 1056, 1060 (10th Cir. 1993). In this case, the ALJ did not find, nor is there any medical evidence to suggest, the degree to which plaintiff's ability to work would have been restored had she abided by any particular physical therapy directives.

The ALJ also relied on a report of plaintiff's daily activities as reported in a consultative psychological examination by Dr. Kohrs. Of course, this report by its very nature focused on plaintiff's psychological capabilities rather than her physical capabilities. Further, the ALJ disregarded the much more thorough and updated report of daily living activities that plaintiff prepared on February 20, 2001 (Tr. at 215-18), which explains the problems that she has caring for her own personal needs; the fact that she requires help cooking, rarely prepares full meals, and instead usually prepares quick or frozen food or eggs or soup; that her mother largely does the laundry for her; she needs help with housework; she moved to a townhouse because she could no longer perform chores outside the home; she has trouble remembering to pay bills and often pays them late; she has trouble shopping insofar as she requires help lifting and carrying heavy items and she gets headaches when she tries to comparison shop; she has difficulty reading; and she no longer engages in her former hobbies of cooking, fishing, camping, riding bikes, and skiing. Also, if the ALJ is going to rely on plaintiff's daily activities as she reported them to Dr. Kohrs, the ALJ must in all fairness likewise consider plaintiff's analogous recitation of her daily activities as she reported them to Dr. Pearce in May of 2002. At that time, plaintiff reported that she used to love to read and cook but has lost interest in both since the accident; she has difficulty managing her finances at times and sometimes pays her bills late; her activities include spending time with family and friends, watching old movies, and puttering around the house; and that she used to enjoy dancing, camping, and gardening, but in addition to losing interest in these activities she physically has been unable to do these activities since the accident.

Further, although the ALJ briefly acknowledged the testimony of plaintiff's former supervisor, Rodney Franz, and her former co-worker, Barbara Webber, the ALJ notably failed to reconcile that testimony with plaintiff's allegations of disability. *See* C.F.R. 20 C.F.R. § 404.1529(a), (c)(3) (stating the Commissioner will consider information provided by other persons about the claimant's daily activities, efforts to work, how the impairment affects the claimant's ability to work, and pain). The ALJ also failed to explain how plaintiff's excellent work history and her attempt to return to work impacted her credibility. *Id.* § 404.1529(c)(3) (stating the Commissioner will consider information about a claimant's prior work record). Further, although the ALJ recited all of the factors listed in 20 C.F.R. § 404.1529, he did not do a particularly commendable job of discussing these factors. Rather, it appears that he discussed isolated evidence in an effort to substantiate his decision to discredit her allegations of disability. In a case such as this, where a proper determination of plaintiff's credibility is particularly critical, the ALJ must perform a more thorough analysis of the evidence in assessing plaintiff's credibility. *See, e.g.*, *Angel v. Barnhart*, 329 F.3d 1208, 1213-14 (10th Cir. 2003) (remanding for the ALJ to conduct a more thorough analysis and make more specific findings regarding the plaintiff's credibility).

C. Whether Plaintiff Can Perform Alternative Work

As explained previously, at step five, the Commissioner bears the burden of showing that the claimant retains the RFC to perform other work available in the national economy. *Bowen v. Yuckert*, 482 U.S. 137, 146, 148 & n.5 (1987); *Rutledge v. Apfel*, 230 F.3d 1172, 1174 (10th Cir. 2000); *Haddock v. Apfel*, 196 F.3d 1084, 1088 (10th Cir. 1999). In an

attempt to satisfy the Commissioner's burden on this issue, the ALJ relied on testimony from a vocational expert (a VE). Plaintiff argues that the VE's testimony does not support the conclusion that she is capable of performing alternative employment. She raises a variety of arguments in this regard.

First, the ALJ found that plaintiff is "moderately" limited in the following mental abilities: remembering locations and work-like procedures; understanding, remembering, and carrying out detailed instructions; maintaining attention and concentration for extended periods; completing a normal workday and workweek absent interruptions from psychologically based symptoms; and performing at a consistent pace without an unreasonable number and length of rest periods. The ALJ did not, however, define the term "moderate" for the VE. Plaintiff argues, citing *Folsom v. Barnhart*, 309 F. Supp. 2d 1286 (D. Kan. 2004), *Frazee v. Barnhart*, 259 F. Supp. 2d 1182, 1193 (D. Kan. 2003), and *Nelson v. Commissioner of Social Security Administration*, 252 F. Supp. 2d 1148, 1164-1165 (D. Kan. 2003), that the ALJ was required to define this term for the VE and, had he done so, the VE would have found plaintiff unable to perform alternative work. The court has reviewed the cases relied upon by plaintiff, and finds that these cases do not support plaintiff's argument. That is, they do not stand for the proposition that further definition of the term "moderate" is required as a matter of law, nor do they support the proposition that any claimant who has these types of moderate limitations must necessarily be found disabled. Rather, the courts' reasoning in those cases turned upon the facts and circumstances of those cases, including the VEs' testimony from the

administrative hearings. Thus, the court finds plaintiff's argument in this regard to be without merit.

Second, plaintiff argues that the ALJ's hypothetical question to the VE should have included the mental limitations found by Dr. Pearce that plaintiff is "markedly" limited in her ability to maintain attention and concentration for extended periods and to complete a normal workday without interruption from psychologically based symptoms and is "moderately" limited in multiple other areas. Plaintiff correctly points out that the VE testified that an individual who is markedly limited in the ability to complete a normal workday absent interruptions from psychologically based symptoms or to perform at a consistent pace without an unreasonable number of rest periods would be unable to perform even unskilled work; hence, plaintiff would be unable to perform alternative work if she suffers from these limitations. As discussed in Section III(A)(3), *supra*, the court is remanding this case to the ALJ to reassess the weight that should be given to the opinions of Dr. Pearce, Dr. Lewis, and Dr. Kohrs. On remand, to the extent that the ALJ determines that Dr. Pearce's opinion on these matters is entitled to greater weight, the ALJ shall include these nonexertional impairments in plaintiff's RFC and consequently the hypothetical question to the VE. *Compare Gay v. Sullivan*, 986 F.2d 1336, 1341 (10th Cir. 1993) (VE testimony can provide substantial evidence to support the ALJ's determination only if the claimant's impairments are reflected adequately in the hypothetical to the VE); *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991) (same), *with Shepherd v. Apfel*, 184 F.3d 1196, 1203 (10th Cir. 1999) (hypothetical to the VE need only include the limitations supported by the record).

Third, plaintiff argues the ALJ relied on the VE's testimony in response to the wrong hypothetical question. The ALJ presented two physical limitation hypothetical questions to the VE. In the first, the ALJ directed the VE to assume that plaintiff could perform grasping and occasional fine manipulation with her dominant right hand only "infrequently," and the VE testified that plaintiff would be unable to perform any alternative work. In the second hypothetical, the ALJ directed the VE to assume that plaintiff had the ability to grasp "occasionally," and the VE then identified alternative work that plaintiff could perform. The ALJ ultimately determined that plaintiff has the RFC to perform these functions occasionally, and he therefore relied on the VE's response to the second hypothetical in determining that plaintiff could perform alternative work. The basis for the ALJ's determination that plaintiff could perform grasping and occasional fine manipulation with her right hand occasionally, as opposed to infrequently, is not entirely clear from the ALJ's opinion. This conclusion does not appear to be supported by substantial evidence in the record given Dr. Harbin's opinion regarding plaintiff's work restrictions due to her musculoskeletal injuries, repeated comments throughout plaintiff's physical therapy treatment notes regarding concerns about her right hand, the report of William D. Kossow, M.D. that plaintiff demonstrated significant atrophy of the right hand and decreased ranges of motion with the right wrist and joint, plaintiff's testimony regarding the problems she has with her right hand, and the testimony of her former co-workers. In light of the VE's testimony, the issue of whether plaintiff can perform these functions only infrequently versus occasionally appears to be a dispositive issue in determining whether plaintiff can perform alternative work. Accordingly, on remand, the ALJ shall more

thoroughly analyze the evidence of record pertaining to this limitation, reevaluate whether plaintiff's suffers from this limitation infrequently or occasionally, reflect the appropriate limitation in the RFC and, consequently, rely on the VE's answer to the appropriate corresponding hypothetical question.

Lastly, plaintiff correctly points out that remand is required because the ALJ failed to resolve conflicts between the VE's testimony and the Dictionary of Occupational Titles (DOT). The VE testified that plaintiff could perform approximately ten to fifteen percent of the sedentary, unskilled job base. Specifically, he identified three types of work: (1) surveillance monitor at DOT 379.367-010 with 50 jobs in the region, 500 in the state, and 20,000 nationally; (2) cashier at DOT 209.567-014 with 400 jobs in the region, 2,400 in the state, and 200,000 nationally; and (3) call-out operator at DOT 237.367-014 with less than 50 jobs in the region, 200 in the state, and 10,000 nationally. The ALJ satisfied his obligation to ask the VE whether the VE's testimony conflicted with the DOT, *see Haddock v. Apfel*, 196 F.3d 1084, 1089 (10th Cir. 1999) (requiring the ALJ to inquire of the VE about any discrepancies); Soc. Sec. Rul. 00-4p, 2000 WL 1765299 (Dec. 4, 2000) (same) [hereinafter SSR 00-4p], and the VE testified that there were not any discrepancies. In fact, however, it appears that the VE's testimony may very well conflict with the DOT listing for cashier because plaintiff contends and the Commissioner does not dispute that this listing requires frequent reaching, handling, and fingering, which are activities that would be precluded even by the ALJ's less restrictive hypothetical question that plaintiff is limited to performing grasping and occasional fine manipulation with her right hand only occasionally. "When

vocational evidence provided by the VE . . . is not consistent with information in the DOT, the adjudicator must resolve this conflict before relying on the VE . . . evidence to support a determination or decision that the individual is or is not disabled." SSR 00-4p. Accordingly, the ALJ is required to address and resolve this apparent conflict between the VE's testimony and the DOT cashier listing at 209.567-014. In addition, plaintiff correctly points out that if the ALJ does not resolve the discrepancies pertaining to the cashier position, which would then preclude reliance on the cashier position in determining whether she can perform alternative work, then the ALJ must reassess whether the alternative positions of surveillance monitor and call-out operator exist in substantial numbers in the national economy. *See Allen v. Barnhart*, 357 F.3d 1140, 1144 (10th Cir. 2004) (remanding for ALJ to determine whether the plaintiff could perform alternative work that exists in significant numbers where the plaintiff could not perform certain types of work identified by the VE given her RFC).

The parties have both dropped footnotes in which they mention one last item, which is the extent to which plaintiff should be awarded benefits based on her first application. Although the parties mentioned this issue, they have not squarely addressed this issue in their written submissions, and the ALJ likewise did not explicitly address this issue. Accordingly, the court declines to address this issue based on the record currently before the court. On remand, the ALJ is directed to clarify the extent to which plaintiff is entitled to an award of benefits based on her first application.

IT IS THEREFORE ORDERED BY THE COURT that the Commissioner's decision is reversed and remanded for further proceedings consistent with this memorandum and order.

IT IS SO ORDERED this 3rd day of September, 2004.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge